Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

YOUN MUN HEE,

Petitioner,

v.

U.S. ATTORNEY GENERAL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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November 9, 2010

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QUESTION PRESENTED

I. Whether the Eleventh Circuit's decision conflicts with SEC v. Chenery Corp., 318 U.S. 80 (1943) where the Court affirmed the decision of the Board of Immigration Appeals based on a ground upon which the Board did not rely?

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OPINION BELOW

The opinion of Court of Appeals for the Eleventh Circuit Court of Appeals was entered on May 3, 2010, under the caption Youn Mun Hee v. U.S. Attorney General, No. 09-14612 (11th Cir. 2010)(unpublished). The decision is attached hereto as Appendix A. Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc. The Petition for Rehearing was denied on August 11, 2010. The Order is attached hereto as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on August 11, 2010. The Eleventh Circuit Court of Appeals had jurisdiction over this matter under 8 U.S.C. § 1252 as there had been a final adjudication on the merits by the Board of Immigration Appeals on August 24, 2009.

This Petition for Writ of Certiorari has been filed and docketed within the time limits prescribed as it was mailed within 90 days of the date the Petition for Rehearing was denied. Thus, the jurisdiction of this Court is properly invoked.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

8 U.S.C. § 1229

(a)Notice to appear

(1) In general
In removal proceedings under section 1229a of this title, written notice (in this section referred to as a notice to appear) shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the aliens counsel of record, if any) specifying the following:

(A) The nature of the proceedings against the alien.
(B) The legal authority under which the proceedings are conducted.
(C) The acts or conduct alleged to be in violation of law.
(D) The charges against the alien and the statutory provisions alleged to have been violated.
(E) The alien may be represented by counsel and the alien will be provided
(i) a period of time to secure counsel under subsection (b)(1) of this section and
(ii) a current list of counsel prepared under subsection (b)(2) of this section.
(F)
(i) The requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an address and telephone number (if any) at which the alien may be contacted respecting proceedings under section 1229a of this title.

(ii) The requirement that the alien must provide the Attorney General immediately with a written record of any change of the aliens address or telephone number.

(iii) The consequences under section 1229a (b)(5) of this title of failure to provide address and telephone information pursuant to this subparagraph.

(G)
(i) The time and place at which the proceedings will be held.
(ii) The consequences under section 1229a (b)(5) of this title of the failure, except under exceptional circumstances, to appear at such proceedings.

(2) Notice of change in time or place of proceedings

(A) In general
In removal proceedings under section 1229a of this title, in the case of any change or postponement in the time and place of such proceedings, subject to subparagraph (B) a written notice shall be given in person to the alien (or, if personal service is not practicable, through service by mail to the alien or to the aliens counsel of record, if any) specifying

(i) the new time or place of the proceedings, and

(ii) the consequences under section 1229a (b)(5) of this title of failing, except under exceptional circumstances, to attend such proceedings.

(B) Exception
In the case of an alien not in detention, a written notice shall not be required under this paragraph

if the alien has failed to provide the address required under paragraph (1)(F).

(3) Central address files
The Attorney General shall create a system to record and preserve on a timely basis notices of addresses and telephone numbers (and changes) provided under paragraph (1)(F).

(b) Securing of counsel

(1) In general
In order that an alien be permitted the opportunity to secure counsel before the first hearing date in proceedings under section 1229a of this title, the hearing date shall not be scheduled earlier than 10 days after the service of the notice to appear, unless the alien requests in writing an earlier hearing date.

(2) Current lists of counsel

The Attorney General shall provide for lists (updated not less often than quarterly) of persons who have indicated their availability to represent pro bono aliens in proceedings under section 1229a of this title. Such lists shall be provided under subsection (a)(1)(E) of this section and otherwise made generally available.

(3) Rule of construction
Nothing in this subsection may be construed to prevent the Attorney General from proceeding against an alien pursuant to section 1229a of this title if the time period described in paragraph (1)

has elapsed and the alien has failed to secure counsel.

(c) Service by mail
Service by mail under this section shall be sufficient if there is proof of attempted delivery to the last address provided by the alien in accordance with subsection (a)(1)(F) of this section.

STATEMENT OF THE CASE AND FACTS

Petitioner is a native and citizen of South Korea. Petitioner entered the United States without inspection by walking across the United States / Canada border in Washington. (A.R. 109)[1] On June 30, 2006, a Notice to Appear ("NTA") was issued alleging that Petitioner was subject to removal under INA § 212(a)(6)(A)(i) for being present in the United States without being admitted or paroled. (A.R. 111) The address listed in the NTA is 908 Glenridge Lane, Nashville, Tennessee 37221. (A.R. 111) The NTA did not contain a hearing date. (A.R. 111) It is unclear when the NTA was actually filed with the Court.

On July 16, 2008, Petitioner's wife, who is a United States citizen, filed an I-130 petition on his behalf. (A.R. 72, 77, 101) On the I-130 filed with United States Citizenship and Immigration Services ("USCIS"), Petitioner lists his residence as 6734 Mimosa Circle, Tucker, Georgia 30084. (A.R. 77)

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[1] A.R. refers to the Administrative Record that was filed with the Eleventh Circuit Court of Appeals. The underlying facts of the case are not disputed. The relevant facts are also set forth in the Eleventh Circuit's decision.

A hearing notice dated July 23, 2008 was allegedly mailed to Petitioner at the 908 Glenridge Lane, Nashville, Tennessee address. (A.R. 110) The notice states that the hearing date is September 17, 2008 at 8:30 a.m. at 180 Spring Street, SW, Suite 241, Atlanta Georgia 30303. (A.R. 110) This is a different address for the Court than the address contained on the NTA. (A.R. 110-11)

Petitioner did not appear at his September 17, 2008 Immigration Court hearing. At that hearing, the Immigration Judge issued an in absentia order of removal. (A.R. 107)

On December 9, 2008, Petitioner filed a motion to reopen with the Immigration Court. (A.R. 57-106) In the motion, Petitioner alleged that the hearing notice was not sent to the last address he provided to the Attorney General. (A.R. 58-60)

On December 18, 2008, the Immigration Judge denied the motion to reopen. The Court found that Petitioner failed to notify the Court of his change of address and as a result, the notice was sent to his last known address. (Appendix C)

Petitioner filed a timely appeal with the Board of Immigration Appeals. On August 24, 2009, the Board dismissed the appeal. (Appendix B) The Board found that Petitioner was required to submit a change of address by filing an EOIR-33 with the Immigration Court. Id. Thus, the Court found that the notice was proper because it was sent to the last address of record. Id.

Petitioner filed a Petition for Review with the Eleventh Circuit Court of Appeals. The Petition was denied solely on the ground that the contents of the I-130 petition filed by Hee's wife were not sufficient to constitute a written record of an address change within the meaning of 8 U.S.C. § 1229(a)(1)(F)(ii). (Appendix A, p. 7) The Court noted that although the I-130 gave Petitioner's Tucker, Georgia address, it did not state that this was a new address or that his address had changed. Id. In reaching its decision, the Court assumed arguendo that a Form I-130 could be used to make the required change of address notification. Id. Thus, the Court explicitly declined to address Petitioner's argument that the BIA erred in requiring his change-of-address notification be on EOIR-33. Id. at fn. 3.

Petitioner filed a timely Petition for Rehearing and Suggestion For Rehearing En Banc. In the Petition, Petitioner argued that the Eleventh Circuit's decision was improper because it was based on an entirely different ground that that used by the Agency in denying the Motion to Reopen. Petitioner further argued that the contents of the I-130 were sufficient notification of his change of address. On August 11, 2010, the Petition for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in the instant case because the decision of the Eleventh Circuit directly conflicts with this Court's decision in SEC v. Chenery Corp., 318 U.S. 80 (1943).

The instant case involves the review of the Board's decision denying Petitioner's motion to reopen his in

absentia order of removal. The basis for the motion was that Petitioner did not receive adequate notice of his hearing at the last address he provided the Attorney General. After receiving the Notice to Appear, he moved to a new address. He did not inform the Court by filing an EOIR-33. However, he did indicate his address on a Form I-130 filed with the Department of Homeland Security. This was filed prior to the Court issuing a removal order. Petitioner argued that by listing his address on the Form I-130, he provided notification of his new address and that a change of address was not required to be made on an EOIR-33. He further argued that since the hearing notice was sent to his old address listed on the Notice to Appear, he did not receive proper notice of his hearing and that proceedings must be reopened.

The decision under review is the Board's decision dated August 24, 2009. (Appendix B) The sole basis for the Board's decision was that the notice of removal hearing was adequate because Petitioner did not notify the Court of his change of address by filing a Form EOIR-33. The Board rejected Petitioner's argument that a notification of a new address could be made on an I-130 as opposed to an EOIR-33.

The Eleventh Circuit denied the Petition for Review. In its decision, the Eleventh Circuit explicitly failed to address the Board's holding that notice was proper because Petitioner did not change his address by filing a Form EOIR-33. Instead, the Eleventh Circuit assumed that an I-130 could be used for a change-of-address notification but found that the contents of the particular I-130 were insufficient to constitute a change of address. This ground was not addressed by either the IJ or BIA based on the

Agency's finding that an EOIR-33 was the only way for an alien to change his address.

The Eleventh Circuit improperly relied upon a ground to deny the motion that was not set forth by the Agency. A fundamental principle of administrative law is that a court can uphold an agency's action or decision only for the reasons the agency expressly relies when it acted. This Court's 1943 decision in SEC v. Chenery Corp. states that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained. Chenery Corp., 318 U.S. at 95. Thus, a federal appellate court cannot affirm the decision of an agency for reasons not addressed by the agency. As such, the Eleventh Circuit's decision is inconsistent with precedent from this Court.

Petitioner's writ of certiorari should be granted. The case must be remanded so that the Eleventh Circuit can review the Board's decision to determine whether the Board's decision set forth a proper justification for denial of the motion.

ARGUMENT

I. The Eleventh Circuit's decision conflicts with SEC v. Chenery Corp., 318 U.S. 80 (1943) where the Court affirmed the decision of the Board of Immigration Appeals based on a ground upon which the Board did not rely.

The instant case involves the review of the Board's August 24, 2009 decision denying Petitioner's motion to reopen. The sole basis for the Board's decision was that the notice of removal hearing was adequate because Petitioner did not notify the Court of his change of address by filing a Form EOIR-33. The Board rejected Petitioner's argument that a notification of a new address could be made on an I-130 as opposed to an EOIR-33. In its decision, the Eleventh Circuit explicitly failed to address the Board's holding that the hearing notice was sent to the proper address since Petitioner did not notify the Court of his new address by filing an EOIR-33. Instead, the Eleventh Circuit assumed that an I-130 could be used for a change-of-address notification but found that the contents of the particular I-130 were insufficient to constitute a change of address. This ground was not addressed by either the IJ or BIA based on the Agency's finding that an EOIR-33 was the only way for an alien to change his address. The Eleventh Circuit improperly relied upon a ground to deny the motion that was not set forth by the Agency.

A fundamental principle of administrative law is that a court can uphold an agency's action or decision only for the reasons the agency expressly relies when it acted. This Court's 1943 decision in SEC v. Chenery

Corp. states that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained. SEC v. Chenery Corp., 318 U.S. 80, 95 (1943). "The Court is powerless to affirm the administrative action by substituting what [may] be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency." SEC v. Chenery, 332 U.S. 194, 196 (1947)("Chenery II") Thus, a court reviewing an agency action cannot supply or substitute grounds for affirming agency action. See e.g. Banks v. Gonzales, 453 F.3d 449, 451 (7th Cir. 2006)(federal judges following Chenery cannot resolve administrative litigation on grounds the agency ignored); Mayo v. Schiltgen, 921 F.3d 177 (8th Cir. 1990)(a reviewing court may not uphold agency action based on reasons not articulated by the agency). The question after Chenery is not whether the ultimate action of the agency is permissible, but whether the agency offered a valid explanation for its action.

In Carpio v. Holder, the Tenth Circuit was presented with the question of whether someone who entered the United States on a K-2 visa was eligible to adjust status after the person turned 21 years old. Carpio v. Holder, 592 F.3d 1091 (10th Cir. 2010). The Court found that the reasons given by the Agency in finding Carpio ineligible for adjustment of status were improper and that he was eligible to adjust status. Id. The Court then goes on to address the government's alternate argument for affirmance of the BIA decision. Id. at 1103. The Tenth Circuit held that it did not have jurisdiction to consider the government's

argument under Chenery since the agency did not rely on the argument in its decision. Id.

In a recent Ninth Circuit decision, the Court remanded a case to the Agency to allow it to address in the first instance whether the alien's conviction for theft rendered him ineligible for cancellation of removal. Arredondo v. Holder, No. 08-73835, __ F.3d __, 2010 WL 4291391 (9th Cir. Nov. 2, 2010). The Board failed to engage in substantive analysis of its decision regarding the impact of the theft conviction on eligibility for cancellation of removal. Id. The Ninth Circuit held that because it could not affirm the Board's decision based on a ground upon which the BIA did not rely, the case must be remanded to clarify the grounds upon which the BIA relied.

Last year, the Eleventh Circuit Court of Appeals, in an unpublished decision, noted that the Eleventh Circuit had not previously applied Chenery where the BIA denied the case on a separate ground. Omoregbee v. U.S. Atty. Gen., 323 Fed.Appx. 829 (11th Cir. Apr. 21, 2009). In that case, the Board did not address the issue of whether Omoregbee had been convicted of an aggravated felony. Id. The Eleventh Circuit held that it would be improper under Chenery to address this basis for removal since the Board had relied on an alternate ground.

The panel's decision in the instant case conflicts with the Supreme Court's decision in Chenery. The affirmance was based on a ground not addressed by the Agency. In the instant case, the Board's decision was based solely upon Petitioner's failure to file a change of address with the Court on a Form EOIR-33. Based on this failure, the Board found that notice was

sufficient at the initial address Petitioner gave to DHS, which was the address contained on the Notice to Appear (Form I-862). In so holding, the Board rejected Petitioner's argument that Form EOIR-33 was only one way in which an alien could notify the government of a change of address.[2]

The Eleventh Circuit's decision affirming the Board's decision was based upon an entirely different ground. The Eleventh Circuit found that the contents of the particular I-130 filed by Hee's wife were insufficient to notify the Attorney General of Hee's change of address. In footnote 3, the panel explicitly stated that they declined to address whether an EOIR-33 is the sole means to notify the Attorney General of a change of address. Thus, the panel did not address the sole ground relied upon by the Board. Its decision was based on the sufficiency of the contents of this particular I-130 for the purpose of notifying the Attorney General of a change of address. It was

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[2] See Beltran v. INS, 332 F.3d 407 (6th Cir. 2003)(a letter to I.N.S. was sufficient notification of a change in address despite not filing an EOIR-33 with the Court); Kamara v. INS, 149 F.3d 904 (8th Cir. 1998)(EOIR-33 not needed for notification of a change of address); Popa v. Holder, 571 F.3d 890, 897 (9th Cir. 2009))an alien can properly change his or her address by submitting an EOIR-33 or other notice of the address). Thus, the decision of the Board in the instant case is inconsistent with the decisions of several appellate courts on the issue of whether an EOIR-33 is the only way to inform the Court of a change of address. In the instant case, the Eleventh Circuit assumed for purposes of the Petition that an I-130 could be used to fulfill this obligation.

improper to rely on this ground since it was never cited by the Agency in its decisions.[3]

The reasoning of the Agency should have been addressed by the Eleventh Circuit to determine if it was sufficient rather than relying on the sufficiency of the contents of the I-130 that had not even been addressed by the BIA or IJ. The Eleventh Circuit's decision violated the rule of this Court announced in Chenery that the court cannot affirm a decision based on a ground not addressed by the agency. Therefore, the writ of certiorari should be granted and the case remanded so that the Eleventh Circuit can review the decision of the Board to determine if it set forth an appropriate ground for denial.

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[3] It was improper to find the contents of the I-130 were insufficient to constitute a written record of a change of address. There is no requirement that notification of an address change under 8 U.S.C. § 1229(a)(1)(F)(ii) state that it is a new address. Furthermore, contrary to the Eleventh Circuit's decision (Appendix A, p. 7), the I-130 did show a change of address since the time the NTA was issued, which was in June 2006. The I-130 shows Petitioner started living at his new address in October 2007. At any rate, this issue was never addressed by the Agency.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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